Supreme Court of the United States

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, *et al.*,
Petitioners,

v.

JOHN DOE # 1, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a district court determines that a class should not be certified, does Rule 23(e) of the Federal Rules of Civil Procedure nevertheless authorize a district court to require notice of the named plaintiffs' voluntary dismissal of their claims to those persons who were putative class members under the invalid class allegations.

2. Whether Rule 60(b)(4) of the Federal Rules of Civil Procedure permits a non-party to void a final judgment solely on the grounds of abuse of discretion.

PARTIES TO THE PROCEEDING

In addition to the parties listed on the caption, the parties to the proceedings include the following petitioners:

H. Foster Pettit
James Amato
Scotty Baesler
Pam Miller
Michael Wilson
Robert Jefferson
George Brown
John McFadden
Lawrence Walsh
Barbara Curry
Arnold Gaither
Donna Alexander Cantrell
Sandra Nichols
Mary Ann Delaney

and ninety-five "John Does" and all others similarly situated as respondents.

Plaintiffs and/or appellants below who are not parties to this petition include:

Barry Lynn Demus, Jr.
Octavius Gillis
Keith Rene Guy, Sr.
Craig Johnson
David T. Jones
Christopher Andrew Williams

and seven "John Does" and all others similarly situated.

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Petitioners Lexington-Fayette Urban County Government, H. Foster Pettit, James Amato, Scotty Baesler, Pam Miller, Michael Wilson, Robert Jefferson, George Brown, John McFadden, Lawrence Walsh, Barbara Curry, Arnold Gaither, Donna Alexander Cantrell, Sandra Nichols, and Mary Ann Delaney (collectively "LFUCG") respectfully seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 1a-19a) is reported at 407 F.3d 755 (6th Cir. 2005). The order denying the Petition for Rehearing En Banc (App. 120a) was entered on August 12, 2005 and is unreported. The district court orders granting summary judgment against plaintiffs on statute of limitations grounds are unreported and were entered on April 15, 2003 and November 21, 2003. App. 70a-98a, 20a-49a. The district court orders denying plaintiffs' Rule 60(b)(4) motions to void its orders denying class certification in two prior actions, and denying plaintiffs' motions to intervene in those earlier actions, are unreported and were denied on October 7, 2003. App. 50a-59a, 60a-69a. The earlier district court orders denying class certification are unreported and were entered on April 4, 2000 and June 28, 2002. App. 101a-104a, 99a-100a.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2005. On August 12, 2005, the court of appeals entered an order denying LFUCG's timely motion for a rehearing and rehearing en banc. App. 120a. The district courts had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

The texts, in relevant parts, of Federal Rule of Civil Procedure 23(e) (2003) and of Federal Rule of Civil Procedure 60(b) are set forth at App. 121a.

STATEMENT OF THE CASE

In the extraordinary decision below, the Sixth Circuit created two separate circuit conflicts on important issues of federal law. First, the Sixth Circuit held that, even though a district court concludes that there is no basis for certifying a class, Federal Rule of Civil Procedure 23(e) still authorizes the court to require notice of a voluntary dismissal of the named plaintiffs' claims to "members" of the non-existent "class." This decision squarely conflicts with decisions of the Fifth and Second Circuits, which have held that Rule 23(e) does not apply in such circumstances. The Sixth Circuit's ruling also conflicts with the reasoning of the Fourth and Ninth Circuits, which have likewise recognized that Rule 23(e)'s notice requirement is inapplicable where class certification is denied.

The underlying issue of class action procedure is enormously important. Under this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the statute of limitations is tolled during the pendency of a "putative" class action—*i.e.*, one in which a class has been alleged but not yet certified—and begins to run anew if certification is denied. The Sixth Circuit's ruling impermissibly expands this already generous principle. It authorizes a district court to require notice to "members" of the non-existent "class" in order to protect reliance interests they may have developed as a result of the tolling principle itself, thereby upsetting the careful balance this Court struck in *American Pipe* between the interests of finality and repose served by statutes of limitations, and the interests of efficiency served by Rule 23. This expansion of *American Pipe* is inconsistent with the language

of Rule 23, and imposes significant costs and burdens on litigants.

The issue is also a recurring one that can affect a great many litigants. There were over 5,000 class actions pending in federal courts during the 12-month period that ended September 2004, and a 2004 study showed that class certification is denied in 27 percent of class action cases. Accordingly, review of this important issue is warranted both to avoid costly notice requirements in hundreds of cases where class certification is denied and to ensure that Rule 23(e)'s notice requirements apply uniformly throughout the federal courts.

Second, based on its misinterpretation of Rule 23(e), the court below went on to hold that the district court's failure to require notice to a non-existent class was an abuse of discretion that justified voiding a final judgment under Rule 60(b)(4). Given the bedrock importance of finality, Rule 60(b)(4) is properly invoked only when a judgment is "void" due to lack of jurisdiction over the subject matter or person, or a due process violation. The Sixth Circuit's dramatic expansion of Rule 60(b)(4) to permit relief based on mere abuse of discretion conflicts with decisions in the Second and Seventh Circuits, which preclude relief on such grounds. In addition, the decision below exacerbates the division among the lower courts over whether non-parties can seek relief under Rule 60(b). The Sixth Circuit's interpretation of Rule 60(b)(4) threatens the finality of voluntary dismissals of class actions, and can only increase the difficulties that parties already face when seeking to settle such expensive litigation. Accordingly, this Court should grant the petition to resolve the conflicts in the lower courts over these significant issues as well.

PROCEEDINGS IN THIS CASE

For nearly thirty years, Petitioner Lexington-Fayette Urban County Government helped to fund a summer program for inner city youth that was founded by Ronald Berry. Claiming

Berry had molested them, seven former participants, including Keith Rene Guy, Sr., initiated criminal charges in the late 1990s, which eventually led to Berry's conviction for 12 counts of sodomy and abuse of minors. This petition arises out of a series of civil actions, filed in the wake of this conviction, in which various plaintiffs sought to hold LFUCG liable based on allegations that it knew of and concealed Berry's actions.

A. *Guy*

On October 15, 1998, four former youth program participants who were among those who initially brought the criminal charges against Berry filed a complaint in the United States District Court in the Eastern District of Kentucky, alleging that LFUCG was aware of and deliberately indifferent to Berry's molestation. *Guy* v. *LFUCG*, No. 98-431-KSF. This initial complaint contained a class action allegation that a panel of the Sixth Circuit ultimately deemed frivolous. This panel of the Sixth Circuit observed that:

> [I]n direct contradiction of the allegations in their complaint, the plaintiffs stated in their filing that "[t]he Plaintiffs have never requested that the subject action be certified as a class action principally because of numerosity." Then apparently confessing a violation of Fed.R. Civ.P.11, the plaintiffs stated, "The Plaintiffs have *never* believed that the class was . . . so numerous that joinder of all members [was] impracticable."

Guy v. *LFCUG*, App. 107a (citation omitted) (alterations and omission in original).

On January 12, 2000, Craig Johnson and David Jones, who alleged that they were also victims of Berry, filed an entry of appearance and a motion to send notice of any settlement to any absent class members. On January 14, 2000, prior to any decision as to class certification or notice, all four original plaintiffs settled and filed a joint motion seeking dismissal. Two weeks later, Johnson and Jones sought to intervene in